S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

TIMOTHY FALL, BETH ANN FALL, MICHIGAN AGGREGATE PRODUCTS, and MICHIGAN INDUSTRIAL CONSTRUCTION CORPORATION,

Plaintiffs/Counter-Defendants-Appellants,

UNPUBLISHED
February 12, 2008

v

No. 275519
Tuscola Circuit Court
LC No. 02-021397-CZ

GREGG LOUDON, LOUDON STEEL TRANSPORTATION, LOUDON STEEL, INC., and MICHIGAN AGGREGATE PRODUCTS, LLC,

Defendants/Counter-Plaintiffs-Appellees.

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendants under MCR 2.116(C)(8) and (10), in this case arising out of various business relationships and dealings relative to the operation of a sand and gravel quarry. We affirm in part, reverse in part, and remand for further proceedings.

Before addressing each of the causes of action alleged by plaintiffs, we shall make some initial observations and findings, giving context to our analysis. First, we are aware of the extensive factual history of this case and familiar with all of the events and transactions, which we will not repeat here, except to the extent relevant to our analysis. Next, there does not appear to be a dispute that a partnership existed between plaintiff Timothy Fall and defendant Gregg Loudon and that Loudon withdrew from the partnership, resulting in dissolution. Indeed, this was the finding of the trial court, and we conclude as a matter of law that a partnership did exist under MCL 449.6, which provides that "[a] partnership is an association of 2 or more persons . . . to carry on a business for profit." In *Byker v Mannes*, 465 Mich 637, 653; 641 NW2d 210 (2002), our Supreme Court stated that "the intent to create a partnership is not required if the acts and conduct of the parties otherwise evidence that the parties carried on as co-owners a business for profit." Here, the evidence clearly established that, by their actions and conduct, Fall and Loudon carried on as partners. This evidence included the written 2001 assignment of the 1964 sand agreement, good until 2013 to mine sand from the subject real property, from Sierra Nevada Mining, LLC (Sierra Nevada), to plaintiff Michigan Aggregate Products (MAP or MAP partnership), which was executed by Fall as president and Loudon as vice-president of the MAP partnership.

However, it is important to distinguish between the existence of the partnership and the enforceability of the particular partnership agreement alleged by plaintiffs; these are two separate matters. A written partnership agreement was prepared by Fall, and while Fall testified that it reflected the parties' general promises, obligations, rights, and understandings regarding operation of the partnership, Loudon never executed the agreement. Plaintiffs contended that the agreement between Fall and Loudon called for a partnership term extending until 2013. An agreement that, by its terms, is not capable of being performed within one year from the making of the agreement is deemed void under the statute of frauds unless the agreement was in writing and signed by the party to be charged with the agreement. MCL 566.132(1)(a); see *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 441; 505 NW2d 275 (1993), mod on other grounds by *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994). In the context of MCL 566.132(1)(a), part performance cannot save it from the statute of frauds. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 540-541; 473 NW2d 652 (1991); *Ordon v Johnson*, 346 Mich 38, 45-46; 77 NW2d 377 (1956); *Whipple v Parker*, 29 Mich 369 (1874); *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 550-551; 487 NW2d 499 (1992). Accordingly, the alleged partnership agreement here was void; however, the written assignment of the sand agreement and accompanying promissory note were signed by Loudon, and these documents suggest some agreement between Fall and Loudon regarding, in general, the operations of the MAP partnership.

We glean from the assignment, when considered in conjunction with the original 1964 sand agreement, that MAP was given the right to remove, load, and ship marketable sand and that MAP would pay Sierra Nevada $492,000 for the right, payable in installments through November 15, 2003. According to the assignment, the final payment could be made, in whole or in part, by the MAP partnership delivering acceptable sand to Sierra Nevada's sand plant, and the assignment included price calculations based on tonnage with respect to the amount of sand that needed to be delivered to satisfy the final payment on the note. On the basis of the language in the assignment and promissory note, we can at most safely conclude that Fall and Loudon had reached agreement between themselves that MAP would be engaged in mining sand from the subject site and be obligated to pay Sierra Nevada on the note. But no more can be said about any other agreements without offending the statute of frauds under MCL 566.132(1)(a), including any agreement regarding the partnership's term that supposedly was to run until 2013.[1]

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[1] While the 1964 sand agreement expires in 2013, we cannot conclude that simply because Fall and Loudon executed the assignment of the sand agreement that they also intended to operate the partnership for the full remainder of the unexpired portion of the sand agreement.

In light of our ruling, we do conclude that the partnership was dissolvable by will, and Loudon did successfully dissolve the partnership by expressing his will to withdraw.[2] We also note that the applicability of the statute of frauds under MCL 566.132(1)(a) does not bar a claim of promissory estoppel or unjust enrichment. *Dumas, supra* at 541 n 9, 546; *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 365; 320 NW2d 836 (1982); *Marrero, supra* at 442; *Clark v Coats & Suits Unlimited*, 135 Mich App 87, 96; 352 NW2d 349 (1984); *Lovely v Dierkes*, 132 Mich App 485, 489; 347 NW2d 752 (1984).[3]

Further, we find that the act of Sierra Nevada assigning the sand agreement in September 2002 to defendant Michigan Aggregate Products, LLC, (MAP LLC), was improper, where Sierra Nevada had previously assigned the sand agreement to the MAP partnership. With the MAP partnership dissolved, the sand agreement assignment was a partnership asset that needed to be distributed in the winding up phase of the partnership,[4] and even if it rightfully should have been

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[2] MCL 449.31 governs dissolution of a partnership, indicating, in pertinent part, that a partnership properly dissolves where it terminates pursuant to a definite term or particular undertaking or by express will of any partner if no definite term or particular undertaking is specified. MCL 449.31(1)(a) and (b). The statute of frauds precludes us from concluding that the partnership was for a definite term, and while the assignment reflects an undertaking to mine sand by the MAP partnership, it is not particularized as to the extent of the undertaking. Accordingly, dissolution was allowable and occurred when Loudon expressed the desire to terminate the partnership.

[3] Defendants also present a statute of frauds argument under MCL 566.106, which addresses interests in land. The argument is that any claim by Fall to ownership of either the sand lease (assignment) or the surface real estate, which was later conveyed to the Falls and then assigned to Loudon, fails because there are no documents conveying such interests in land. With respect to the assignment of the sand agreement, Fall's claim for this property or asset arises out of his argument concerning the proper method to dissolve and wind up the partnership, not on the basis of any alleged conveyance. MAP acquired the assignment pursuant to a writing signed by Fall and Loudon. There is no statute of frauds problem under MCL 566.106 for purposes of the sand agreement assignment. With regard to the surface real estate, plaintiffs simply claimed that their conveyance of the property to Loudon through the assignment was induced by fraud and should be voided, thereby returning the interest back to their ownership. This does not implicate MCL 566.106.

[4] MCL 449.8 dictates that the rights in the sand agreement pursuant to the assignment constituted partnership property. "The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management." MCL 449.24. "A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property." MCL 449.26. "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." MCL 449.29. "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." MCL 449.30. On dissolution of a partnership, its assets are distributed to the partners. MCL 449.40; MCL 449.38; *Howe v Webert*, 332 Mich 84, 95; 50 NW2d 725 (1952).

distributed to Loudon in full, the transfer or conveyance of the assignment would have been from the MAP partnership to Loudon's company MAP LLC, and not from Sierra Nevada to MAP LLC. "Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name." MCL 449.8(3). Sierra Nevada had nothing to assign; therefore, MAP LLC acquired nothing. The MAP partnership technically still retained the rights under the 2001 assignment. However, Loudon effectively took full control of the sand mining operation in 2002.

In summarized form, the trial court ruled that a sand mining and excavation partnership existed, with Fall and Loudon as partners, that Loudon properly withdrew from the partnership by his expressed will, MCL 449.31(1)(b), thereby dissolving the partnership, that Loudon was thereafter entitled to a winding up of the partnership and division of the partnership's assets, that Loudon properly acquired the sand agreement assignment (partnership asset) from Sierra Nevada by way of MAP LLC, given that Loudon paid the remaining debt on the assignment, and that it was appropriate for Loudon to solely obtain the sand agreement assignment, to the exclusion of Fall, because "Loudon simply got out of the partnership that which he put into the partnership and was minimizing his losses." Apparently, the trial court believed that Loudon was entitled to the sand agreement asset because he provided money as his capital contribution to the partnership, which was used to pay Fall a salary for doing some of the excavation and mining work, to pay toward the $492,000 promissory note on the assignment, and to rent excavation and mining equipment from plaintiff Michigan Industrial Construction Corporation (MICC), a corporation with its sole shareholder being plaintiff Beth Ann Fall (Mrs. Fall). The trial court failed to explain how its conclusions related to the causes of action alleged by plaintiffs, and some of the claims were not even related to sand agreement assignment.

While plaintiffs alleged nine separate counts, each pertaining to some or all of the parties, plaintiffs' case can be boiled down to the following alleged harms or injuries: failure to grant Fall any interest in the sand agreement assignment, or compensation for the interest, despite his contributions, with Loudon inappropriately receiving the entire asset solely for himself; improper use of the MAP name relative to the creation of MAP LLC by Loudon; Loudon fraudulently obtaining the surface real estate from the Falls; and defendants improperly keeping certain equipment belonging to MICC on the basis of an alleged mechanic's lien held by defendant Loudon Steel Transportation for equipment repairs.

With this background, we now turn to the various causes of action alleged by plaintiffs. Count I of the complaint alleged breach of fiduciary duty by Loudon individually. Plaintiffs maintained that Loudon owed Fall a duty of good faith and fair dealing and that the duty was breached when Loudon misappropriated trade secrets and partnership assets so as to steal the business away from Fall.

Count I was dismissed pursuant to MCR 2.116(C)(10). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood,* 461 Mich 109, 121; 597 NW2d 817 (1999).

"Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability." MCL 449.20. Moreover, pursuant to MCL 449.21(1)(entitled partner accountable as a fiduciary), "[e]very partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property." In *Band v Livonia Assoc*, 176 Mich App 95, 113-114; 439 NW2d 285 (1989), this Court expressed the nature of the fiduciary relationship that exists between partners:

> The courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs. Partners are held to a standard stricter than the morals of the marketplace and their fiduciary duties should be broadly construed, connoting not mere honesty but the punctilio of honor most sensitive. The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information. Each partner has the right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs. Thus, disclosure to one or several partners does not fulfill this duty as to every other partner. [Citations and internal quotations omitted.]

"[T]he cases involving a partner's breach of the fiduciary duty to other partners have been concerned solely with placing the wronged partners in the economic position that they would have enjoyed but for the breach." *Gilroy v Conway*, 151 Mich App 628, 637; 391 NW2d 419 (1986).

In viewing the evidence in a light most favorable to plaintiffs, there was evidence to show that Loudon obtained the assignment of the sand agreement, a partnership asset with an undetermined value, without accounting to Fall for any of the value. Indeed, viewing the evidence in a light most favorably to defendants, we conclude, as a matter of law, that Loudon breached his fiduciary duties to Fall, although we leave for the trier of fact the determination whether Fall incurred any damages as a result of the breach.

There was evidence that the sand agreement was worth about $500,000 at the time the partnership was commenced, and that value may have increased when Sierra Nevada agreed to purchase 40,000 tons of sand annually at $3.25 per ton for five years once MAP satisfied all payments then due under the promissory note, a gross value of $130,000 annually. Based on Fall's work done before the partnership began, he and Loudon were able to obtain the sand agreement for $492,000, and Fall's efforts in mining sand during the partnership and delivering it to Sierra Nevada partially reduced the amount owed under the promissory note, leaving $180,000 owing around the time the partnership was finally dissolved.[5] Fall did not provide any cash investment as a capital contribution for the partnership, but he did contribute to the partnership his considerable excavation experience in working the property, his negotiation of the sand agreement assignment, his actual labor in excavating and mining the property, his delivery of sand to Sierra Nevada that helped reduce the amount owed on the note, and he obtained use of the equipment necessary to excavate and mine the sand.[6] We recognize that, through cash contributions made by Loudon, Fall did receive a salary for his work and the equipment was rented from MICC. Loudon made a $375,000 capital contribution to the partnership and paid $50,000 to pay off what appears to be a discounted remaining debt owed under the promissory note. Further, there was evidence that Loudon continued to solicit sales of sand and gravel after he dissolved the partnership, which may have led to additional unaccounted for sales.

We find that Loudon breached his fiduciary duties because he was simply not entitled to walk away from the partnership on dissolution with the sand agreement assignment in tow without any winding up of the business, an accounting for the value of the sand agreement assignment, and, possibly, a distribution of an interest, or compensation thereon, to Fall. Again, there was not even an effective conveyance of the asset to MAP LLC.

The Uniform Partnership Act, MCL 449.1 *et seq.*, seeks to make partners whole economically. *Gilroy, supra* at 637. Fall is considered a co-owner of the sand agreement assignment, with Fall and Loudon holding it as tenants in partnership. MCL 449.25. "Every partner must account to the partnership for any benefit[.]" MCL 449.21(1). Loudon's act of dissolving the partnership by expressing his will to withdraw did not terminate the partnership, which does not occur "until the winding up of partnership affairs is completed." MCL 449.30. Partners who have not wrongly dissolved the partnership have the right to wind up the partnership affairs, MCL 449.37, yet Fall was given no say in the matter as Loudon took sole control of the mining operation. Also, partners have the right to a formal accounting as to partnership affairs when "circumstances render it just and reasonable" and when there is a wrongful exclusion from the possession of partnership property. MCL 449.22(a) and (d). There was no accounting here.

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[5] A letter from Sierra Nevada to Fall indicated that, as of March 2002, MAP had paid $172,000 in cash toward the note "and excavated and hauled sand to [Sierra Nevada] with a value of $118,430," equaling credits against the note in the amount of $290,430, leaving, at the time, $201,570 owing.

[6] The term "capital contribution" is defined as "[c]ash, property, or services contributed by partners to a partnership." Black's Law Dictionary (7th ed).

Furthermore, [e]ach partner shall be repaid his or her contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied." MCL 449.18(a). Additionally, MCL 449.38(1) provides in part:

> When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners.[7]

The rules for distributing partnership property on dissolution of a partnership are set forth in MCL 449.40, and after the payment to creditors and to partners for liabilities owing other than for capital and profits, distribution is to be made to partners in respect to capital, MCL 449.40(b). Valuation should be made at the time of dissolution, and the winding up of partnership affairs entails gathering the assets, paying and settling debts, and distributing any net surplus to parties entitled to it. See *Wanderski v Nowakowski*, 331 Mich 202, 209-210; 49 NW2d 139 (1951).

Loudon did not engage in any of the activities required to properly wind up a partnership, and this constituted a breach of his fiduciary duties to Fall. However, this does not mean that Fall was necessarily damaged by the breach if he was not entitled to any interest in the sand agreement assignment despite making some contributions in obtaining and operating under the assignment. We are cognizant of defendants' arguments concerning questionable practices by plaintiffs, including claims relating to improper charges by MICC and misrepresentations by Fall regarding various matters, such as whether sand alone could be mined under the sand agreement as opposed to sand and gravel. Also, Fall did receive a salary for his excavation and mining work. Further, no value has been placed on the assignment. This must all be contemplated in assessing the issues of causation and damages under the fiduciary duty count.[8] The trial court erred in dismissing the claim.

Count II alleged breach of a partnership agreement. As discussed above, while a partnership between Fall and Loudon did exist to mine sand based on actions and conduct and the written assignment, we cannot recognize any partnership agreement detailing the particulars of the partnership because of the statute of frauds under MCL 566.132(1)(a). Accordingly, count

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[7] Under the statute, partnership assets can be divided on dissolution rather than sold. *Rinke v Rinke*, 330 Mich 615, 628; 48 NW2d 201 (1951).

[8] We note that the statute of frauds does not preclude this claim because a partnership did exist, which necessarily gave rise to fiduciary duties, MCL 449.20 and MCL 449.21, regardless of the fact that the alleged partnership agreement was void under MCL 566.132(1)(a).

II fails as a matter of law under MCR 2.116(C)(8).[9] We do point out that any argument to save the substance of the breach of partnership agreement claim on a promissory estoppel basis in avoidance of the statute of frauds fails for the reasons set forth later in this opinion in our discussion of promissory estoppel. While we conclude infra that an unjust enrichment claim should not have been dismissed, we do not find that this renders the claim for breach of partnership agreement salvageable. Our implying a contract pursuant to unjust enrichment merely extends to a possible obligation by Loudon to account for any interest held by Fall in the sand agreement assignment. We also note that the allegations in this count simply provide that the agreement was breached "in numerous ways." This is insufficient pleading under MCR 2.111(B). The trial court did not err in dismissing this count.

Count III alleged tortious interference with contractual and business relationships. Plaintiffs alleged that Loudon interfered with the contractual and business relationship between the MAP partnership and others, including the relationship between MAP and Sierra Nevada that was created by Fall pursuant to the sand agreement assignment.

"The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005). First, plaintiffs do not present their arguments in the context of any relevant legal authority on the issue. "'It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Additionally, the contract between MAP and Sierra Nevada was not breached, nor does this count contain any allegations that a contract was breached. The claim was properly dismissed.[10]

To bring a claim of tortious interference with a business relationship or expectancy, the plaintiff must show (1) the existence of a valid business relationship or expectancy, which does not have to be predicated on an enforceable contract; (2) knowledge of the relationship or

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[9] MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express,* 454 Mich 373, 380-381; 563 NW2d 23 (1997).

[10] To the extent that plaintiffs are claiming that Loudon interfered with a contract between himself and Fall, the claim would fail because a party to a contract cannot maintain a cause of action for tortious interference against another party to that same contract. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 382; 689 NW2d 145 (2005).

expectancy by the defendant; (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) damage to the party whose relationship or expectancy was disrupted. *Health Call, supra* at 90. The intentional interference must be improper, involving "a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1985).

With respect to interference with any business relationship or expectancy held by MAP, the claim fails. Although Loudon knew that there existed a valid business relationship between MAP and Sierra Nevada and that MAP held a business expectancy because of the relationship, the termination of the relationship and expectancy was not due to any *improper interference* by Loudon. Loudon's act of withdrawing from the partnership and causing the partnership to dissolve was not improper for the reasons discussed earlier, and it was this act that essentially ended any continuing business relationship and expectancy held by MAP. Although it may have been improper for Loudon to take sole control of the mining operation under the assignment, if a valid winding up of the partnership had occurred, the MAP partnership would be defunct and still would have lost its interest in the mining operation. However, viewing this matter from the perspective of Fall and not the partnership entity, a different result must be reached. Fall's ongoing business relationship with Sierra Nevada, created via the assignment to MAP, and his business expectancy would not necessarily be halted by dissolution of the partnership if, in the winding up phase of the partnership, he would have been entitled to an interest in the sand agreement assignment. While the statute of frauds under MCL 566.132(1)(a) prevents us from finding that Fall had a valid business expectancy that the partnership would run until 2013, during which time the partnership would enjoy the full benefits of the assignment, the statute of frauds does not preclude a finding that Fall had an expectancy to reap some form of benefit arising out of the sand agreement assignment, which was executed by Fall and Loudon. We conclude that the documentary evidence, when viewed in a light most favorable to plaintiffs, could support a finding that Loudon tortiously interfered with Fall's business expectancy.[11] Accordingly, the trial court erred in dismissing the claim of tortious interference with a business relationship or expectancy, but only as that claim relates to Fall.

Count IV alleged unjust enrichment. To establish unjust enrichment, a plaintiff is required to show (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Barber v SMH (US) Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). When the elements of unjust enrichment have been shown, "the law operates to imply a contract in order to prevent unjust enrichment." *Id*. But a contract will not be implied if there is an express contract covering the same subject matter. *Id.* Here, we cannot recognize an express contract or agreement regarding the partnership because of the statute of frauds; therefore, a claim for unjust enrichment is not precluded. Moreover, when viewing the evidence in a light most favorable to plaintiffs, a genuine issue of material fact exists regarding whether Loudon unjustly received a benefit from

[11] With respect to Mrs. Fall, we rule that dismissal was proper as there is no supporting evidence.

Fall by keeping the sand agreement assignment entirely for himself and pursuing the mining operation under the MAP LLC name, to Fall's exclusion, and whether it would be inequitable to Fall for Loudon to retain the benefit under the circumstances. Accordingly, the trial court erred in dismissing this count.

Count V alleged common-law trademark infringement and unfair competition relative to Loudon's operation of the mining business under the MAP LLC name, where the partnership operated under the name MAP. Plaintiffs sought injunctive relief, preventing further trademark infringement and unfair competition by Loudon. This count was dismissed under MCR 2.116(C)(8).

Injunctive relief may be appropriate when a business competitor has adopted a name that is confusingly similar to one already being used by another business and the similarity likely or probably results in confusion among consumers who are using ordinary care. *Boron Oil Co v Callanan*, 50 Mich App 580, 584; 213 NW2d 836 (1973). "Actual confusion of customers, clients, or the public at large does not need to be shown; it is sufficient if the acts of the defendant indicate that probable confusion will occur." *Id.* The likelihood of confusion must be evaluated in terms of the particular facts of each case. *Id.* Although there is no particular formula for the courts to utilize, precedents reveal that "[c]orporate names are confusingly similar when the first two words of a compound name are identical and in the same sequence." *Ed Subscription Service, Inc v American Ed Services, Inc*, 115 Mich App 413, 421; 320 NW2d 684 (1982). On the other hand, a plaintiff is not entitled to an injunction where the similarity of names is "so slight as to be unlikely to confuse others than the careless or indifferent or they involved banks or insurance companies or concerns doing business with a specialized field." *220 Bagley Corp v Julius Freud Land Co*, 317 Mich 470, 473; 27 NW2d 59 (1947).

Under the case law, this claim was sufficiently pled in the complaint. We do conceive of one potential problem with this claim, which is that the MAP partnership was dissolved, and it is no longer conducting operations and business. Therefore, there would not appear to be a competition issue. Plaintiffs argue that the process of winding up the partnership has not been completed, and that is technically true, especially given that the sand agreement asset was not properly conveyed. But the fact remains that the partnership will no longer conduct operations. However, on the possibility that Fall obtains an interest in the sand agreement assignment by way of this litigation and decides to resume operations under the MAP name, injunctive relief might be appropriate. This claim was prematurely dismissed.

Count VI alleged promissory estoppel. Plaintiffs alleged that they presented Loudon with a written partnership agreement and that the parties proceeded to conduct business pursuant to the agreement, with Loudon promising to sign "the written agreement or a suitable equivalent." The trial court dismissed this count under MCR 2.116(C)(8). To establish a promissory estoppel claim, a plaintiff must show "(1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999). To establish a claim of promissory estoppel, a promise must be clear and definite. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2005). Plaintiffs' position, apparently, is that they not only want enforcement of Loudon's promise to execute the prepared partnership agreement, they also seek enforcement of the promises made in the agreement. Making Loudon sign the partnership agreement would in turn make him obligated under the agreement's terms. There are no allegations in this count that Loudon promised to perform a specific task in the partnership agreement or promised to comply with a specific provision, e.g., allowing the partnership to run until 2013 or giving Fall a 51% interest. And the problem with the complaint, in the absence of such allegations, is that the alleged promise was simply to execute the written partnership agreement *or* a suitable equivalent. This is not a clear and definite promise to sign the partnership agreement, and the reference to a suitable equivalent leaves the door open to endless possibilities, thereby also lacking definiteness. Accordingly, the promissory estoppel claim fails under MCR 2.116(C)(8).

Count VII alleged fraudulent inducement. Plaintiffs alleged that Loudon induced the Falls to execute an assignment of their purchase agreement for the surface real estate in favor of Loudon. The alleged inducement was a promise by Loudon to continue participation in the partnership, but, according to plaintiffs, Loudon lacked an intent to comply with the inducement when it was made. Plaintiffs contended that, because of the fraud perpetrated against the Falls, the real estate assignment should be voided and set aside. Although the trial court dismissed this count under MCR 2.116(C)(8), the court's discussion, which focused on the sand agreement assignment, provided no rationale with regard to dismissal of the fraudulent inducement claim.

"A promise regarding the future cannot form the basis of a misrepresentation claim." *Forge v Smith*, 458 Mich 198, 212; 580 NW2d 876 (1998). However, this Court in *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639,640; 534 NW2d 217 (1995), explained an exception to the rule under the law of fraud:

> While plaintiff is correct in asserting that, in general, actionable fraud must be predicated on a statement relating to a past or an existing fact, Michigan also recognizes fraud in the inducement. Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon. Fraud in the inducement to enter a contract renders the contract voidable at the option of the defrauded party. [Citations omitted.]

On the basis of the case law describing the tort, we find that plaintiffs' complaint sufficiently pled a claim for fraudulent inducement and that the allegations satisfied the particularity requirement of MCR 2.112(B)(1) in regard to claims of fraud. Accordingly, the trial court erred in dismissing the count under MCR 2.116(C)(8).

With regard to the conversion and unjust enrichment claims involving the MICC equipment, counts VIII and IX, in viewing the evidence in a light most favorable to plaintiffs, there existed a genuine issue of material fact as to whether defendants wrongfully exerted control over MICC's equipment and with respect to whether defendants received a benefit from MICC that would be inequitable to retain because defendants did not have permission to use the equipment. See *Pamar Enterprises, Inc v Huntington Banks of Michigan*, 228 Mich App 727, 734; 580 NW2d 11 (1998); *Barber, supra* at 375. Whether defendants properly imposed a mechanic's lien also presented a genuine issue of material fact.

In sum, we hold that the trial court erred in dismissing the claims for breach of fiduciary duty, tortious interference with a business relationship or expectancy as to Fall, unjust enrichment relative to Loudon taking sole control of the sand agreement assignment, common-law trademark infringement and unfair competition, fraudulent inducement, conversion, and unjust enrichment relative to MICC. The trial court did not err in dismissing the claims for breach of the partnership agreement, tortious interference with a contractual relationship, tortious interference with a business relationship or expectancy relative to MAP and Mrs. Fall, and promissory estoppel. Furthermore, we find, as a matter of law, that Loudon breached his fiduciary duties to Fall; however, a question of fact remains regarding whether the breach caused damages to Fall.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ William B. Murphy
/s/ Stephen L. Borrello